



**Tasmac Limited v Nassau Limited & 4 others (Civil Application
27 of 2021) [2021] KECA 228 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 228 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 27 OF 2021
P NYAMWEYA, JA
DECEMBER 3, 2021**

BETWEEN

TASMAC LIMITED APPLICANT

AND

NASSAU LIMITED 1ST RESPONDENT

LYDIA MORAA ONDIEKI 2ND RESPONDENT

RUGGERO SCIOMMERI 3RD RESPONDENT

CALEDONIA LIMITED 4TH RESPONDENT

REGISTRAR OF COMPANIES 5TH RESPONDENT

(An application for leave to file a Notice of Appeal out of time against the ruling of the High Court at Malindi (Nyakundi J.) dated 26th February 2021 in Malindi HCCC 17 of 2019 (O.S.))

RULING

1. The application that this the subject of this ruling is a Notice of Motion dated 24th March 2021 brought by Tasmac Limited, seeking leave to file a Notice of Appeal out of time against the ruling delivered by the trial Court on 26th February 2021 in Malindi Civil Suit No. 17 of 2019 (O.S.) - Tasmac Limited vs Nassau Limited and 4 others, and that the Draft Memorandum of Appeal and Notice of Appeal annexed be deemed as duly filed and served. Further, that the costs of the application be provided for.
2. The application is erroneously brought pursuant to Rule (2)(B) of the *Court of Appeal Rules*, and is supported by an affidavit sworn on 24th March 2021 by Vincent Mogaka Nyaboga, an advocate of the High Court of Kenya, who is seized of this matter. The said advocate deponed that a ruling on a preliminary objection by the 1st, 3rd and 4th Respondents in Malindi Civil Suit no. 17 of 2019 (O.S.) - Tasmac Limited vs Nassau Limited and 4 others was scheduled to be delivered on 12th February 2021,



and on that date, the trial Court notified the parties that the ruling would be delivered on notice. However, that the advocate holding his brief did not receive the said notice. Subsequently, on 5th March 2021, the deponent was informed that the said ruling delivered on 26th February 2021 while visiting the 1st, 3rd and 4th Respondents' advocates' offices, which is when he also obtained a copy of the same.

3. The 1st and 3rd Respondents filed a Replying affidavit in opposition to the application sworn on 15th April 2021 by Ruggero Sciommeri, the 3rd Respondent herein, who also stated that he is a director of the 1st Respondent. He averred that the notice of delivery of the subject ruling was placed on the trial Court's Notice Board and sent to the respective parties' advocates. Further that a Mr. Michira, who was holding brief for the advocate for the Applicant, was present when the ruling was delivered, and that it was expected he would inform the advocate on record of what transpired in Court.
4. The Respondent faulted the Applicant for not disclosing that all parties received emails from the Court forwarding the ruling on 2nd March 2021, and not from the advocates of the Respondents as alleged. Further, that there was no need to peruse the Court file since all that was needed was the ruling if the Applicant intended to file a Notice of Appeal. Therefore, that the Applicant has not given sufficient and credible reason for the delay in filing the Notice of Appeal, which is inexcusable.
5. The application was heard by way of written submissions in the absence of the parties. Mogaka Bwongaki & Company Advocates for the Applicant filed written submissions dated 16th September 2021, while the Respondents' advocates, Kilonzo & Aziz Company Advocates filed submissions dated 24th September 2021. The power to extend time is provided in Rule 4 of the Court of Appeal Rules, and under Rule 53(1) of the Rules, this power may be exercised by a single Judge of this Court. While the Court has wide unfettered discretion in this regard, it should act judiciously and according to the principles set out in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, (1999) 2 EA 231* where the court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

6. In the present application, the Applicant's counsel gave a detailed background to the suit in Malindi Civil Suit No. 17 of 2019 (O.S.) -Tasmac Limited vs Nassau Limited and 4 others in his submissions. The learned counsel contended that if the application is not allowed the Applicant stands to lose €480,000/= arising from the fraudulent sale of its shares, and deserves its day in court as the right to fair hearing is constitutionally entrenched. On the delay in lodging the Notice of Appeal, the Applicant submitted that the instant application was filed after a delay of 5 days, and urged the Court to find that the reasons it advanced justified the delay. Reliance on the decision in *Vishva Stone Suppliers Company Limited vs RSR Stone (2006) eKLR* in this regard.
7. The 1st, 3rd and 4th Respondents' counsel likewise gave the history of the suit in his submissions. Reference was made to Rule 4 of the Court of Appeal Rules and the decision in *Abdul Aziz Ngoma vs Mungai Mathayo & Another [1976] eKLR* to submit that the Court can only exercise its discretion in favour of an applicant where a compelling case justifying the delay is presented. The Respondent reiterated that a copy of the ruling was sent to the Applicant's Advocates by an email dated 2nd March 2021, and no satisfactory reason was offered why the Applicant did not file the instant application within 14 days from the time he got the ruling. The Respondents also cited the decisions in *Annab*



Mwihaki Wairuru vs Hannah Wanja Wairuru [2017] eKLR and *Bains Construction Co. Ltd vs John Mzare Ogowe [2011] eKLR* in support of his arguments that the Applicant's advocates were required to act professionally.

8. I have considered the rival arguments by the parties herein, and it is not in dispute that the ruling intended to be appealed from was delivered on 26th February 2021. The background to the said ruling was that the parties had in an earlier suit, entered into a consent dated 16th September 2014 on the shareholding of the 1st Respondent. The Applicant thereupon filed the suit in Malindi Civil Suit No. 17 of 2019 (O.S.) - Tasmac Limited vs Nassau Limited and 4 others, against the Respondents, challenging the sale and transfer of 480 shares held by the Applicant in the 1st Respondent. The said application was objected to by the Respondents mainly on the ground that the same was *res judicata*, and the trial Court upheld the preliminary objection in the ruling delivered on 26th February 2021. The Applicant alleges that his appeal has a chance of succeeding as the trial Judge failed to appreciate that the issues in the two suits were different.
9. Rule 75(2) of the Court of Appeal Rules requires that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against. Rule 82 requires the appeal, which shall include the memorandum of appeal, to be lodged within sixty days of the date of lodging of the Notice of Appeal. The ruling sought to be appealed herein was delivered on 26th February 2021, and the last day for lodging the appeal was therefore 12th March 2021. The instant application was lodged on 25th March 2021 thirteen days later, and I find that the delay herein is not inordinate. The Applicant's counsel has explained that the delay was caused by difficulties in accessing the ruling and in receiving instructions, which reasons are plausible.
10. A perusal of the draft memorandum of appeal indicates that there is an issue raised therein as regards the application of the doctrine of *res judicata* to the Applicant's suit. In addition, the Respondents do not dispute that there was a sale of the Applicant's shares, and the Applicant therefore stands to suffer prejudice if it is not give its day in Court. The Respondents in this regard after impugning the Applicant's advocate's conduct, pointed out that litigation must come to an end. Any prejudice they will suffer in this regard can however be adequately be addressed by way of costs.
11. I therefore find that arising from the above stated factors, the Applicant merits the exercise of this Court's discretion in its favour. I accordingly allow the Applicant's application by way of the Notice of Motion dated 24th March 2021 to the extent of the following orders:
 1. The Applicant herein is granted leave to file and serve a notice of appeal within 14 days from the date of this ruling, and shall within 60 days from the date of lodging of the notice of appeal, file and serve the appeal.
 2. The costs of this application shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF DECEMBER 2021.

P. NYAMWEYA

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JUDGE OF APPEAL

